

12-1-2007

## "If Sex Offenders Can Marry, then Why Not Gays and Lesbians?": An Essay on the Progressive Comparative Argument

Courtney Megan Cahill  
*Roger Williams University School of Law*

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Family Law Commons](#), and the [Sexuality and the Law Commons](#)

---

### Recommended Citation

Courtney M. Cahill, *"If Sex Offenders Can Marry, then Why Not Gays and Lesbians?": An Essay on the Progressive Comparative Argument*, 55 Buff. L. Rev. 777 (2007).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol55/iss3/3>

This Essay is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

# **“If Sex Offenders Can Marry, Then Why Not Gays and Lesbians?”: An Essay on the Progressive Comparative Argument**

COURTNEY MEGAN CAHILL†

One of the criticisms commonly leveled by progressive and conservative commentators alike at those who advocate for same-sex marriage is that the movement is decidedly imitative. For instance, in 1993, feminist academic Professor Nancy Polikoff characterized the lesbian and gay community’s “desire to marry” as “an attempt to mimic the worst of mainstream society.”<sup>1</sup> More recently, conservative

---

† Associate Professor of Law, Roger Williams University, School of Law. Ph.D., Princeton University; J.D., Yale Law School; B.A., Barnard College, Columbia University. I would like to thank the School of Law at Roger Williams University for graciously providing the financial assistance necessary to complete this Essay, Germaine Gurr for her predictably illuminating thoughts and suggestions on this piece, and the faculty at the University of Toledo, College of Law, where an early version of this Essay was presented.

1. Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,”* 79 VA. L. REV. 1535, 1536 (1993). For other commentators who have considered the extent to which current marriage equality discourse has come to echo or replicate conservative marriage idiom and the image of marriage that that idiom projects, see Lisa Duggan, *The New Homonormativity: The Sexual Politics of Neoliberalism*, in MATERIALIZING DEMOCRACY: TOWARD A REVITALIZED CULTURAL POLITICS 175, 187-88 (Russ Castronovo & Dana D. Nelson eds., 2002) (stating that the neoliberal marriage rhetoric championed by Andrew Sullivan and others projects a “role for marriage” that “sound[s] an awful lot like the dangerous mixture of ‘moral education, psychotherapy and absolution’” that has long marked conservative marriage idiom, and criticizing Sullivan in particular for adopting a purely imitative conception of marriage as, in his words, the “mirror image of the happy heterosexuality I imagined around me”); Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 246-47 (2006) (stating that “enough of the arguments” recently deployed by same-sex marriage advocates “echo[ ] a longing for a kind of contemporary coverture, whereby one or both previously individuated subjects are dissolved into a joint legal and economic unit by and through the institution of marriage”); Suzanna Danuta Walters, *Wedding Bells and Baby Carriages: Heterosexuals Imagine Gay Families, Gay Families Imagine Themselves*, in THE USES OF NARRATIVE: EXPLORATIONS IN SOCIOLOGY, PSYCHOLOGY, AND CULTURAL

author, columnist, and same-sex marriage opponent, Shelby Steele, remarked that "[t]he true problem with gay marriage is that it consigns gays to a life of mimicry and pathos."<sup>2</sup> Strange bedfellows, commentators like Polikoff and Steele are drawn together by a common idiom of imitation, one that advocates on both sides of the ideological same-sex marriage divide have turned to as a way of characterizing not only same-sex marriage but also the imitative structure of certain legal strategies on which sexual minorities have relied in order to secure equal marital rights.<sup>3</sup>

Whether the push for marriage equality is hopelessly imitative, and thus normatively undesirable, is a question on which this Essay remains largely agnostic. Its principal focus, rather, is on the imitative structure of a particular rhetorical strategy on which those who support same-sex marriage have recently relied when making arguments for why same-sex marriage prohibitions are unconstitutional. Specifically, supporters have increasingly invoked a comparative argument that shares many of the structural and substantive features of the slippery slope, a disgust-triggering mechanism and a long time favorite of marriage traditionalists who hysterically presage that same-sex marriage will lead the Nation precipitously into incest and

---

STUDIES 48, 54 (Molly Andrews et al. eds., 2004) (stating that marriage might emerge from the same-sex marriage movement as "a hierarchy of intimacy that replicates the heterosexual one, rather than challenging or altering it"). For an opposing view, see Mae Kuykendall, *Resistance to Same-Sex Marriage as a Story About Language: Linguistic Failure and the Priority of a Living Language*, 34 HARV. C.R.-C.L. L. REV. 385, 390 (1999) ("Gay marriage speech is sincere and is not in any rigorous sense 'mimicry' of heterosexual marriage speech."); Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 587 (1995) ("What many gay people do not want is an all-or-nothing model imposed on their lesbian or gay identity; they want both to be gay *and* married, to be gay *and* part of the larger society. For these lesbians and gay men, being gay is not just about being different, it is also about being equal. Their deeply-held convictions about how they want to live their lives and liberation are not mere mimicry. They are entitled to respect within our community as well as by the state.").

2. Shelby Steele, *Selma to San Francisco?*, WALL ST. J., Mar. 18, 2004, at A16.

3. See, e.g., Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 115 (David Kairys ed., 3d ed. 1998).

other disgust-inducing taboos.<sup>4</sup>

The comparative argument, which this Essay will analyze in greater depth below, goes something like this: if *even* sex offenders may marry, then why not gays and lesbians? This progressive argument is comparative because it considers a morally inferior group, sex offenders, relative to one that is morally superior to it, gays and lesbians.<sup>5</sup> Moreover, this argument is predicated on notions of comparative worthiness because it assumes that group X, sex offenders, that already enjoys the right to marry, is less worthy than group Y, gays and lesbians, which does not. Finally, the comparative worth argument is a kind of reverse slippery slope because it assumes that the legal recognition of those who are better (gays and lesbians) is somehow logically compelled by the legal recognition of those who are worse (sex offenders). A version of this argument has been widely embraced by commentators who support same-sex marriage and by those who advocate for same-sex marriage in marriage equality litigation.<sup>6</sup>

That those who support and advocate for same-sex marriage have come to rely on an argument that mimics, whether consciously or not, the slippery slope is remarkable given the extent to which that trope is so often deployed as an argument *against* same-sex marriage. Equally remarkable is the extent to which the progressive comparative argument tends to trigger our moral outrage, and, at times, our disgust—an illiberal sentiment traditionally associated with reactionary elements in the same-sex marriage debate and a human emotion of which sexual minorities have historically been the unfortunate target.<sup>7</sup> Indeed, how has it

---

4. For a survey of those arguments, see Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1554-62 (2005); see also Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005).

5. The *Oxford English Dictionary* provides “comparative” as one definition of “relative,” and defines “relative” as “[a]rising from, depending on, or determined by, relation to something else or to each other.” OXFORD ENGLISH DICTIONARY 551 (2d ed. 1989). I should note that I am using “comparative,” here and throughout, in the sense of “relative” rather than in the sense of comparable or roughly equal.

6. See *infra* Part I.B *passim*.

7. See Cahill, *supra* note 4, at 1577-1601.

come to be that same-sex marriage liberals have appropriated a most illiberal rhetoric and is this rhetorical move either strategically or normatively desirable?

This Essay will consider three questions: (1) what is the progressive comparative argument and which features does it share with the slippery slope, (2) why have marriage progressives increasingly used this argument in marriage equality discourse, and (3) whether the argument is a good idea. Part I will set forth the comparative argument as it has appeared in a variety of legal sources, including academic commentary, litigation briefs, and judicial opinions, and will highlight the substantive and structural similarities that the argument shares with the slippery slope. Part II will then offer three different explanations for why marriage progressives have increasingly turned to this particular argument, notwithstanding its similarities to the slippery slope and its disgust-inducing tendencies. Here, this Essay will consider the potentially beneficial effects of rhetorical mimicry or appropriation more generally. Part III will finally argue that the progressive comparative argument is both strategically counterproductive and normatively undesirable, not least of which because it promotes a decidedly thin vision of tolerance that maintains, rather than rejects, a proper role for revulsion in our legal order.

## I. THE PROGRESSIVE COMPARATIVE ARGUMENT AND THE CONSERVATIVE SLIPPERY SLOPE TROPE

This Part offers a survey of the progressive comparative argument and highlights the features that it shares with the slippery slope, a rhetorical trope which is itself a kind of comparative disgust argument. Because this Essay contends that the progressive comparative argument is an imitation (specifically, a reverse form) of the conservative slippery slope argument, a brief review of the structural and substantive features of the slippery slope, and an explanation of its comparative disgust function, is useful. To that end, Subsection A will consider what the slippery slope looks like and how it functions. Subsection B will then provide a survey of the progressive comparative argument as it has appeared in a variety of legal sources. Finally, Subsection C will highlight the structural and substantive similarities between the progressive comparative argument

and its conservative forebear. This Subsection will also, where relevant, highlight some of the differences between these two arguments.

A. *The Conservative Slippery Slope (or Comparative Disgust) Argument*

The slippery slope is a long-time rhetorical favorite of marriage traditionalists who believe that same-sex marriage will lead us inexorably into polygamy, incest, and other sexual abominations.<sup>8</sup> In *Bowers v. Hardwick*,<sup>9</sup> the Supreme Court invoked the metaphor of the slope not in the context of same-sex marriage but rather to portend the world of sexual abandon that would result should the Court find that a right to “homosexual conduct” existed under the Constitution.<sup>10</sup> Shortly before the Supreme Court decided *Lawrence v. Texas*,<sup>11</sup> then-Senator Rick Santorum did the same to presage the evils that would inevitably result should the Supreme Court reverse *Bowers* (which of course it did in *Lawrence*).<sup>12</sup> Perhaps most famously, Justice Scalia turned to slippery slope rhetoric in his *Lawrence* dissent to bemoan the dissolution of the law’s (and society’s) moral fabric that would, in his estimation, surely flow from *Lawrence* and the majority’s suggestion in that case that majoritarian moral disapproval no longer constituted even a legitimate state interest for laws that prohibited certain conduct.<sup>13</sup>

---

8. See *id.* at 1554-62; see also Ruth E. Sternglantz, *Raining on the Parade of Horribles: Of Slippery Slopes, Faux Slopes, and Justice Scalia’s Dissent in Lawrence v. Texas*, 153 U. PA. L. REV. 1097, 1097-98 (2005); Volokh, *supra* note 4.

9. 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

10. *Bowers*, 478 U.S. at 195-96 (“[I]t would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.”).

11. 539 U.S. 558 (2003).

12. Interview by the Associated Press with Sen. Rick Santorum (Apr. 7, 2003), *available at* [http://www.usatoday.com/news/washington/2003-04-23-santorum-excerpt\\_x.htm](http://www.usatoday.com/news/washington/2003-04-23-santorum-excerpt_x.htm) (“[I]f the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.”).

13. *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (“If, as the Court

The conservative invocation of the slippery slope in the same-sex marriage debate constitutes a comparative disgust argument for two interrelated reasons: (1) because it sets up a comparative or relative hierarchy of unsavory relationships; and (2) because it is a comparative argument that triggers disgust. First, the slippery slope is comparative in the sense that it sets up a hierarchy, albeit a slippery one, of repulsive relationships on the slope, each of which is either more or less disgusting relative to the other. That is, those relationships which sit at the top of the slope are, relatively speaking, less disgusting than those into which we might plunge at the bottom—as well as those which we might find along the way.<sup>14</sup> Same-sex marriage, which rests tentatively and precariously on the flat ground at the top of the slope, most likely registers low on the disgust scale as compared to, or relative to, the other relationships which routinely appear below it (e.g., incest and bestiality).

Second, and as I have argued in a previous article, the rhetorical figure of the slippery slope is a powerful way to convey disgust or revulsion over otherwise consensual sexual relationships.<sup>15</sup> Because the slope is both downward and slippery, it assumes that governmental recognition of same-sex marriage will lead us tumbling down an incline where we will encounter progressively more disgusting relationships along the way, from polygamy, to incest, to bestiality (and most likely in that order). Indeed, it is that very (slippery) hierarchy of disgust that makes the slope such an effective way to trigger fear—and, of course, disgust—over something which, relatively or comparatively speaking, might not be as disgusting as something else. For instance, while same-sex marriage might not look at all like incest, the conservative juxtaposition of same-sex marriage *with* incest has the effect of triggering the disgust that we

---

asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws [e.g., criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity] can survive rational-basis review.”).

14. For the structural features of the slippery slope, see Cahill, *supra* note 4, at 1550-54; Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469 (1999); Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

15. Cahill, *supra* note 4, at 1577.

all feel when in the proximity of anything that brings us closer to incest. The true ingenuity of the slippery slope, then, is that it leaves us directing our disgust toward the thing at the top that demands our immediate attention (here, same-sex marriage) even as it forces us to recognize that the thing at the bottom is worse. In this way, the slippery and inexorable aspect of the slope tends to undercut the comparative or relative aspect of the slope because the former (i.e., the slope's slipperiness) suggests that any and all attempts to maintain the latter (i.e., the slope's comparative gradient) are virtually impossible.

Because conservative slippery slope arguments in the marriage context have the tendency to collapse the comparatively more disgusting things on them into each other, they can be enormously effective from a strategic perspective. For instance, cognitive scientists have shown that political conservatives, unlike political liberals, exhibit disgust over same-sex relationships. Both groups, however, equally exhibit disgust, or what those scientists call "moral dumbfounding," over incest.<sup>16</sup> By juxtaposing something that we all agree is bad (incest) with something that only some of us find morally objectionable (same-sex marriage), the conservative slippery slope argument offers "an opportune way of winning the debate over same-sex marriage" because it alerts would-be same-sex marriage supporters that "incest is disgusting and must therefore be avoided at all costs—even if that means that [they] might end up sacrificing a cause which they tend to support."<sup>17</sup>

### B. *The Progressive Comparative Argument: A Survey*

Marriage progressives have increasingly turned to a kind of comparative argument that is structurally and substantively similar to the conservative slippery slope or comparative disgust argument. As mentioned in this Essay's Introduction, the progressive comparative argument goes something like this: It is irrational for the state to withhold marriage from committed same-sex partners (or from gays and lesbians more generally) because the state already

---

16. See Jonathan Haidt & Matthew A. Hersh, *Sexual Morality: The Cultures and Emotions of Conservatives and Liberals*, 31 J. APPLIED SOC. PSYCHOL. 191, 194 (2001).

17. Cahill, *supra* note 4, at 1577.



allows all sorts of unsavory folks—people who are arguably worse than those committed same-sex partners—to get married. In the words of one commentator:

[W]e allow murderers and rapists (even those who have murdered or raped previous spouses) to marry; we allow [pedophiles] and child molesters to marry. We do not stop child abusers or . . . 'dead beat dads' . . . from marrying. Sadists, masochists and fetishists may marry and are not obliged to choose partners with similar inclinations. People who are HIV-infected or suffer from AIDs [sic] are allowed to marry. . . . Transvestites may marry . . . . And transsexuals may marry so long as they marry someone of the other gender from that which they themselves were born in . . . . Should we then deny marriage to those who wish to enter into unions with a member of their own sex?<sup>18</sup>

Legal scholar and staunch same-sex marriage advocate Professor William Eskridge, Jr. has invoked comparative rhetoric to make a somewhat similar argument, namely, that the government need not approve of a couple's "lifestyle" in order to extend it the right to marry, as the government already extends marriage to a whole panoply of individuals whose "lifestyle" it finds "deviant" and distasteful. He says:

Convicted felons, divorced parents who refuse to pay child support, delinquent taxpayers, fascists, and communists—all receive marriage licenses from the state. The Supreme Court stands ready to discipline any state that denies these citizens their right to marry, yet no one believes that the license constitutes state approval of felony, default on support obligations, tax delinquency, communism, or fascism. People considered sexually deviant also routinely get marriage licenses. Pedophiles, transvestites, transsexuals, sadists, masochists, sodomites, and hermaphrodites can get marriage licenses in every state—so long as they can persuade the state that they are heterosexual pedophiles, transvestites, transsexuals, sadists, masochists, sodomites, and hermaphrodites (sometimes this is a pretty scholastic exercise). Gay people constitute virtually the only group in America whose members are not permitted to marry the partner they love. This is intolerable.<sup>19</sup>

---

18. M.D.A. Freeman, *Not Such a Queer Idea: Is There a Case for Same Sex Marriages?*, 16 J. APPLIED PHIL. 1, 1-2 (1999).

19. WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 12 (1996).

Each of these pro-same-sex marriage arguments might aptly be termed a comparative argument if we think about “comparative” not necessarily in the sense of comparable or roughly equal, but rather in the sense of “relative,” that is, “[a]rising from, depending on, or determined by, relation to something else or to each other.”<sup>20</sup> Specifically, each argument considers sexual minorities relative to others who are either (1) presumably less, or at the very least equally, marriage-worthy (e.g., murderers and rapists); or (2) presumably more, or at the very least equally, sexually deviant (e.g., sadists, masochists).

Numerous other commentators and public figures have deployed a species of this argument to underscore the flagrant inequity of withholding marriage from a group that deserves it while extending it to a virtual “rogues’ gallery”<sup>21</sup> of heterosexuals who, under their view, deserve it less.<sup>22</sup>

---

20. OXFORD ENGLISH DICTIONARY, *supra* note 5, at 551.

21. EVAN GERSTMANN, SAME-SEX MARRIAGE AND THE CONSTITUTION 28 (2004).

22. See, e.g., *id.* at 28, 34; JONATHAN GOLDBERG-HILLER, THE LIMITS TO UNION: SAME-SEX MARRIAGE AND THE POLITICS OF CIVIL RIGHTS (2002); MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 201 (1999); Rev. Gregory Dell et al., *Session One: Social, Cultural, and Philosophical Issues*, 7 U. CHI. L. SCH. ROUNDTABLE 1, 8 (2000) (“No comparable rights of others are violated by the institution [of marriage] being made available to same-sex couples. To the contrary . . . it seems quite telling of whose rights are being denied that ‘heterosexual pedophiles, transvestites, transsexuals, sadists, masochists, sodomites, and hermaphrodites’ can get marriage licenses in every state but gay people cannot.” (quoting ESKRIDGE, *supra* note 19, at 12)); William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equality*, 74 IND. L.J. 1085, 1119 (1999) (“The wildest, most beast-like heterosexual man is allowed to marry, and the Supreme Court has held that even convicted murderers and rapists have a presumptive right to marry.”); Samuel A. Marcossan, *The Lesson of the Same-Sex Marriage Trial: The Importance of Pushing Opponents of Lesbian and Gay Rights to Their “Second Line of Defense,”* 35 U. LOUISVILLE J. FAM. L. 721, 740-41 (1996-1997) (commenting that Hawaii’s stated interest for prohibiting same-sex marriage, encouraging the optimal setting for parenting, lacks rationality because “the State does not even prevent convicted, recidivist pedophiles from marrying”); Mark Tanney, *The Defense of Marriage Act: A “Bare Desire to Harm” an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99, 121 (1997) (“Immoral’, ‘depraved’ individuals committing ‘abominations’ frequently have the right to marry in America. Rapists and child molesters have the right to marry. Convicted murderers spending life in prison . . . have the right to marry.”); Gina Farag, *Examining the Premises Behind the Anti-Gay Marriage Movement* 3 (Feb. 16, 2007) (unpublished manuscript), available at [http://www.crossleft.org/files/Same-sex%20Marriage%20IPC4\(posted%20Feb16\).doc](http://www.crossleft.org/files/Same-sex%20Marriage%20IPC4(posted%20Feb16).doc) (“Certainly, committed, same-sex relationships cannot be considered as bad as or worse than rape or child

For instance, one commentator remarked that the "encouraging the optimal setting for parenting" rationale sometimes offered by states in support of same-sex marriage prohibitions lacks rationality from a constitutional perspective because "the State does not even prevent convicted, recidivist pedophiles from marrying."<sup>23</sup> Similarly, another commentator recently pronounced that if "[w]ife-beaters, rapists, pimps, and pornographers may wed with the law's approval," and "[i]f marriage can survive the drug dealer marrying the child abuser, it can probably weather the storm of [two men or two women marrying]."<sup>24</sup> Finally, to drive home his point that the proposed Federal Marriage Amendment "is the biggest assault on gay rights in U.S. history," Andrew Sullivan remarked that the amendment would ban considerably more than "equality in civil marriage, a right that is now guaranteed to murderers, child abusers, deadbeat dads, multiple divorcees, and foreigners."<sup>25</sup>

Indeed, this notion that it is unfair to withhold the right to marry from gays and lesbians because the government routinely extends that right to a whole cast of contemptible and repulsive characters now pervades popular discourse in a way that recalls the public's quick and easy reliance on the slippery slope to argue the contrary. Why shouldn't gays and lesbians be allowed to marry? Because otherwise, incest and bestiality. Why should they be allowed to marry? Because already,

---

molestation . . .").

23. Marcossan, *supra* note 22, at 741.

24. Donald A. Dripps, *Three Tensions, and One Omission, in the Case for the Federal Marriage Amendment*, 42 SAN DIEGO L. REV. 935, 938 (2005).

25. Andrew Sullivan, Editorial, *A Call to Arms: It's No Exaggeration To Say That the Federal Marriage Amendment is the Biggest Assault on Gay Rights in U.S. History*, THE ADVOCATE, Nov. 11, 2003, available at [http://findarticles.com/p/articles/mi\\_m1589/is\\_2003\\_Nov\\_11/ai\\_111166134](http://findarticles.com/p/articles/mi_m1589/is_2003_Nov_11/ai_111166134) [hereinafter Sullivan, *A Call to Arms*]; see also David Adox, *What's the Difference Between a Homosexual and a Murderer? A: One Can Get Married, The Other Can't*, SALON, May 2, 1997, <http://www.salon.com/may97/sullivan970502.html>. ("The Constitution guarantees the right to marry to murderers, to prisoners, to people with a history of neglecting their children, to people who have remarried 10 times, to O.J. Simpson, to Elizabeth Taylor. If all these people have a fundamental civil right to marry, as I think they do, we do too."); Andrew Sullivan, Op-Ed., *The State of Our Unions*, WALL ST. J., Oct. 8, 2003 at A24 [hereinafter Sullivan, *The State of Our Unions*] ("Even murderers on death row have the constitutional right to marry, where the institution could do no conceivable social good.").

murderers and pedophiles.<sup>26</sup> Or, as a writer on one website remarked: "The United States Supreme Court has held that marriage can not [sic] even be denied to incarcerated felons. Thus, in every state, murderers and rapists may marry, but loving, committed, tax-paying soccer moms may not if they are lesbians."<sup>27</sup>

Progressive comparative rhetoric is not limited to academic commentary and popular discourse. Rather, plaintiffs in marriage equality cases, and even some courts, have increasingly appealed to a version of the argument as a way of expressing what on an immediate, intuitive level seems inexcusably unjust. For instance, during the trial of the first phase of California's marriage equality case, *In re Marriage Cases*, an attorney for the plaintiffs responded to the state's attorney's argument that California's opposite-sex marriage limitation protects children with the following remarks: "Child abusers, child molesters, even child murderers can get married as long as they marry someone of the opposite sex."<sup>28</sup> More recently, in that same case, the city of San Francisco argued in its brief to the California Supreme Court that "the marriage exclusion tells lesbians

---

26. A survey of blogs and other websites dealing with the question of same-sex marriage has produced a number of hits where this claim is made. See, e.g., Daniel J.H. Greenwood, *Amendment 3: Radical and Wrong*, DESERT MORNING NEWS, Oct. 10, 2004, at AA02, available at <http://old.law.utah.edu/faculty/bios/greenwoodd/opinion/radicalandwrong.htm> ("If murderers can marry, surely law-abiding citizens should be allowed to do so too."); Demian, *Most Compelling Reasons for Legal Marriage* (Mar. 15, 2007), <http://www.buddybuddy.com/demian01.html> ("[H]igh courts have ruled, that sinners, such as murderers, convicted felons, wife-beaters, and adulterers—even if they are in prison—have the constitutional right to marry."); Reflections by Naomi Stephan, <http://www.blog.naomimusic.com> (June 13, 2006, 20:05) ("Mass murderers, wife beaters, pedophiles, sex offenders, child abusers, alcoholics, criminals and rapists [can] marry one opposite sex gender person."); Best Webfoot Forward, <http://webfoot.com/Blog/MarriagePost20040629.html> (June 29, 2004) ("Murderers have the right to get married. Serial killers have the right to get married. Serial rapists have the right to get married. Even men who are still in prison for raping and killing multiple women have the right to get married . . . . Convicted child abusers have the right to get married. Convicted child molesters have the right to get married. People convicted of molesting and killing multiple children have the right to get married.")

27. Same Sex Marriage, <http://www.libertyassociates.com/pages/SameSexMarriage.htm> (last visited Aug. 29, 2007).

28. Ed Brayton: More Bad Arguments Against Gay Marriage, [http://scienceblogs.com/dispatches/2004/12/more\\_bad\\_arguments\\_against\\_gay.php](http://scienceblogs.com/dispatches/2004/12/more_bad_arguments_against_gay.php) (Dec. 26, 2004, 6:13 PM).

and gay men that they are less worthy than child abusers, or sex offenders, or convicts in prison for murder. Because after all, those people *do* have the right to get married.”<sup>29</sup> Finally, a plaintiff in an earlier case contended that the argument that opposite-sex marriage limitations are constitutional because gays and lesbians make bad parents doesn’t “hold water” because “[a]lcoholics, drug addicts and those on welfare . . . are given the right to marry and bring children into this world . . . .”<sup>30</sup>

The progressive comparative argument (or progressive comparative reasoning) has had similar appeal for some jurists. Some courts, for instance, have reasoned that the procreation rationale for same-sex marriage prohibitions<sup>31</sup> is irrational because “all sorts of people can marry and have children: convicted murderers, child abusers, pedophiles, racketeers, and drug pushers.”<sup>32</sup> Others have asserted that the fundamental right to marry cannot be withheld from same-sex couples since it “cannot be taken from deadbeat dads, spousal abusers, and other condemned criminals.”<sup>33</sup> And still others have remarked that the procreation rationale is “grossly under-inclusive” because “[c]onvicted felons (including those guilty of child and/or spousal abuse), persons who don’t fulfill child support obligations, and persons suffering from mental health and/or substance abuse problems are allowed to marry.”<sup>34</sup>

---

29. Petitioner City and County of San Francisco’s Opening Brief on the Merits at 1-2, *In re Marriage Cases*, No. S147999 (Cal. Apr. 2, 2007), available at <http://www.sfgov.org/site/uploadedfiles/cityattorney/SUPCT-OPENINGBRIEF.pdf>; see also *id.* at 47 (stating that “in granting marriage licenses, . . . the State [does not] inquire into a person’s fitness as a spouse or a parent. People who have been divorced several times have the option to try again. . . . People who have committed and even been convicted of domestic violence may marry. Sex offenders and child abusers may marry”).

30. Brief and Argument of Appellant—Regina Pavone at 31, *In re Estate of Hall*, 707 N.E.2d 201 (Ill. App. Ct. 1998) (No. 97-4654).

31. The argument is that same-sex marriage prohibitions are constitutional because they are rationally related to a legitimate governmental interest in encouraging the propagation of the human race.

32. *New York v. Greenleaf*, 780 N.Y.S.2d 899, 903 (Just. Ct. 2004).

33. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 764 (Ct. App. 2006) (Kline, J., concurring in part, dissenting in part), *superseded by grant of review* 149 P.3d 737 (Cal. 2006).

34. Ruling on Plaintiffs’ and Defendant’s Motions for Summary Judgment at 59, *Varnum v. Brien*, No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007),

It is finally worth noting that courts have also turned to the comparative argument in contexts other than same-sex marriage. For instance, dissenting in *Lofton v. Secretary of the Department of Children and Family Services*, in which the Eleventh Circuit upheld Florida's statute that categorically prohibits sexual minorities from becoming adoptive parents, one judge reasoned that the state's alleged interest in protecting children from societal disapproval of homosexuality was woefully underinclusive since the state did not also ban "[c]hild abusers, terrorists, drug dealers, rapists and murderers" from adopting.<sup>35</sup> Similarly, in upholding the state of New York's Sex Offender Registration Act (SORA) against a federal due process claim in *People v. Cintron*,<sup>36</sup> the state supreme court reasoned that "[i]f the right to enter into a same sex marriage is not considered fundamental, the right to avoid stigmatization as a sex offender . . . most certainly cannot rise to this status."<sup>37</sup> Whereas courts typically advert to the comparative argument in a permit-permit sense (i.e., if pedophiles, then same-sex couples), the *Cintron* court used it in an alternative, not-permit-not-permit sense (i.e., if not same-sex couples, then *surely* not sex offenders).

### C. *Conservative Comparative Disgust and Progressive Comparative Worth: A Comparison*

Progressive comparative worth rhetoric shares many of the substantive and structural features of its conservative forebear. Before analyzing the arguments' similarities, however, it is useful to consider their differences. Progressive comparative rhetoric differs from the conservative marriage slippery slope argument in four key respects.

First, whereas the conservative slippery slope argument is, of course, a sloped hierarchy (i.e., if same-sex marriage, then we might inexorably slip or slide into incest and bestiality), the hierarchy generated by its progressive counterpart is relatively fixed and static (i.e., gays and lesbians, or same-sex couples, will not cause slippage into

---

<http://www.domawatch.org/stateissues/iowa/varnumvbrien.html>.

35. 377 F.3d 1275, 1301 (11th Cir. 2004).

36. 827 N.Y.S.2d 445 (Sup. Ct. 2006).

37. *Id.* at 453.

something worse but are being treated worse than those who are far inferior to them). Second, whereas the conservative slippery slope argument is deployed in a prohibit–prohibit sense (i.e., in order to prohibit incest we must also prohibit same-sex marriage), its progressive version operates in a permit–permit sense (i.e., if sex offenders or welfare recipients can marry, then surely same-sex couples can). Third, and relatedly, whereas the conservative slippery slope argument presages that we theoretically could slip into something bad (e.g., the legal recognition of incest), its progressive version assumes that we are already in a situation where the bad thing is permitted (e.g., sex offenders marrying). Fourth, and last, whereas the conservative slippery slope argument is a slippery hierarchy of relationships (i.e., same-sex marriage, incest, polygamy, bestiality), its progressive version is largely a fixed and static hierarchy of people (i.e., sexual minorities as compared to murderers, sex offenders, welfare recipients, etc.).

Notwithstanding these differences, we might think about the progressive comparative argument as an imitation of the conservative marriage slippery slope argument for four reasons. First, and on a purely aural level, the arguments sound similar. They both rely, for example, on a linguistic strategy of *amplificatio*, a rhetorical term that refers to the arranging of words in a sequence of increasing force for dramatic and persuasive effect.<sup>38</sup> Slippery slope arguments reach a climax as one nears the bottom of the slope: polygamy, incest, and *even* bestiality.<sup>39</sup> Similarly, the progressive comparative

---

38. See Gideon O. Burton, *The Forest of Rhetoric* (*Silva Rhetoricae*), <http://rhetoric.byu.edu/> (search “*Silva Rhetoricae*” for “figures of amplification”; then follow matching hyperlink).

39. See, e.g., Dan Kennedy, *Dept. of Perverse Logic: Doing it Doggy-Style on the Homophobic Right*, THE PHOENIX.COM, July 11-17, 2003, [http://www.thebostonphoenix.com/boston/news\\_features/this\\_just\\_in/documents/03007023.htm](http://www.thebostonphoenix.com/boston/news_features/this_just_in/documents/03007023.htm) (citing the conservative slippery slope argument that “[o]nce consent—“choice”—supplants marriage as the important interest served by cloaking sexual activities as constitutional rights, by what principle is any consensual adult sexual conduct not a protected right? Bigamy? Polygamy? Prostitution? Incest? Even—if we assume animals can consent, or that their consent does not matter—bestiality?” (quoting George Will, *Lap Dancing on the Constitution*, June 27, 2003, <http://www.sodomylaws.org/lawrence/lweditorials/099.htm>)); THE AM. FAMILY ASS’N, *HOMOSEXUALITY IN AMERICA: EXPOSING THE MYTHS* 5 (1994), [http://www.afa.net/homosexual\\_agenda/homosexuality.pdf](http://www.afa.net/homosexual_agenda/homosexuality.pdf)

argument catalogues undesirables in a hierarchical sequence of increasing severity: “[c]hild abusers, child molesters, and *even* child murderers”<sup>40</sup> or “[e]*ven* murderers on death row have the constitutional right to marry.”<sup>41</sup>

Second, and on a substantive level, progressive comparative arguments use totalizing rhetoric that recalls the totalizing tendencies of the slippery slope. The conservative slippery slope is totalizing because it (inaccurately) assumes, for example, that “incest” is something that we all know when we see it, despite the fact that the definition of incest might—and often does—differ significantly from jurisdiction to jurisdiction.<sup>42</sup> Similarly, the progressive comparative argument is totalizing because it often assumes (1) that all murderers or all sex offenders are equally bad, and (2) that murderers, sex offenders, and other undesirables are heterosexual.<sup>43</sup> In other words, neither the conservative nor the progressive comparative argument makes fine-tuned distinctions within the larger category or categories that it is using as a point of comparison (e.g., incest, sex offenders) to the state of affairs under consideration (e.g., same-sex marriage, the legal prohibition thereof).

Third, and on a structural level, the progressive comparative argument, like the conservative marriage slippery slope trope, is comparative. The conservative slippery slope argument has a comparative or relative structure that assumes that certain relationships (i.e., same-sex marriage) are less disgusting than others (i.e., incest and bestiality), even as they all must be equally prohibited. In much the same way, the progressive comparative argument has a comparative or relative structure that assumes that committed gays and lesbians deserve marriage more than a whole host of unsavory characters, including, but not limited to, murderers, child abusers, pedophiles and other sex offenders, and welfare

---

(“Prominent homosexual leaders and publications have voiced support for pedophilia, incest, sadomasochism, and even bestiality.”).

40. Brayton, *supra* note 28 (emphasis added).

41. Sullivan, *The State of Our Unions*, *supra* note 25, at A24 (emphasis added).

42. See Cahill, *supra* note 4, at 1562-66 (noting the definitional variety of incest in the United States).

43. *But see* ESKRIDGE, *supra* note 19, at 12 (recognizing that the group of deviants to which sexual minorities are being compared are heterosexuals).



recipients. In other words, according to the conservative comparative argument, X, or same-sex marriage, is not as bad as Y, or incest/bestiality. Similarly, according to the progressive comparative argument, X, or sexual minorities who cannot marry, are not as bad as Y, or heterosexual sex offenders who can.<sup>44</sup>

---

44. Theoretically, one might here object that marriage progressives have deployed the comparative argument not to suggest that sexual minorities, or same-sex couples, are necessarily better than, say, sex offenders, child murderers, and sadomasochists. Rather, perhaps they have deployed the comparative argument to show that same-sex marriage prohibitions are really based on animus against sexual minorities as people because they do not similarly apply to murderers, who are considered by others to be at least as bad. Or, perhaps they have deployed the comparative argument to show that same-sex marriage prohibitions that are predicated on morality or child-welfare concerns are underinclusive because they fail to include within their ambit individuals who also engage in behavior that many individuals likely find immoral or an endangerment to children. Under this view, sexual minorities, or same-sex couples, need not be better than sex offenders, murderers, and sadomasochists to make the argument work. Rather, the relevant characteristic that they bear in this context (i.e., a gay or lesbian sexual orientation) need simply not be any more dangerous or immoral than the relevant 'characteristics' that murderers and sex offenders bear in this context (i.e., a history of physical and sexual violence, respectively). Put differently, the progressive comparative argument does not necessarily hang on a comparative or relative *distinction* between sexual minorities and the folks to whom they are being compared. Rather, if I argue that "gays and lesbians should be able to marry because sex offenders or murderers already can," I might in effect be saying that "because gays and lesbians are certainly no more dangerous and immoral (or perceived by others as such) than murderers and sex offenders, gays and lesbians should be able to marry the person of their choice also." Under this interpretation, whether gays and lesbians are better people is beside the point because what really matters is whether the same justifications that are offered in defense of same-sex marriage prohibitions similarly apply to certain heterosexual people. If so, then it makes no sense to deny to group X, sexual minorities, that which is given to group Y, heterosexual murderers and sex offenders.

At the same time, however, it is much more likely that the progressive comparative argument assumes that sexual minorities, or same-sex couples, *are* better than the disreputable folks who already can get married. Those progressive comparative arguments that have been made in the wake of *Lawrence v. Texas* likely assume that sexual minorities are better than, say, sex offenders because after that case members of the former group no longer presumptively engaged in criminal activity—something which we know that members of the latter group have engaged in simply by virtue of the fact that it includes sex offenders. Those progressive comparative arguments that were made even before *Lawrence* was decided likely assumed that sexual minorities were better than, say, sex offenders and murderers because the "criminal activity" in which members of the former group presumptively engage (presumably) did not involve harm to others in the same way that many sex offenses and murder both do. Indeed, we would be hard pressed to read a

Fourth, and on a more functional level, the progressive comparative argument, like the conservative marriage slippery slope trope, uses its comparisons to trigger either moral indignation, disgust, or both simultaneously. The conservative comparative argument directs our disgust at that which sits at the abyss of the slope, that is, at that which is morally worse than that which rests at the top (i.e., same-sex marriage). While the progressive comparative argument does not direct what can properly be called our “disgust” toward the thing at the top of the hierarchy—gays, lesbians, and same-sex couples generally—it does trigger our indignation over the inequity of prohibiting individuals from marrying who are comparatively that much better than a whole host of “repulsive” figures who are already allowed to do so. In other words, according to the conservative comparative argument, we are disgusted because X, or that which is better than Y and which disgusts us less, might lead us straightaway into Y, or that which disgusts us more (or the most). Similarly, according to the progressive comparative argument, we are outraged because X, which is better than Y, is being treated worse than Y.<sup>45</sup>

While the comparison between sexual minorities and sex offenders might very well trigger our indignation over the inequity of withholding from the former that which is enjoyed by the latter, does it necessarily trigger our disgust? This Essay contends that the progressive

---

statement like “those people [i.e., sex offenders] *do* have the right to get married” (whereas worthy gays and lesbians do not) in any way *but* as a declaration that gays and lesbians are better than sex offenders and for that reason really deserve the right to marry. When one hears a progressive comparative argument like the one deployed by the city of San Francisco, *see generally* Petitioner City and County of San Francisco’s Opening Brief on the Merits, *supra* note 29, what one immediately hears is not the legal argument that it implicitly contains (i.e., same-sex marriage prohibitions that flow from a desire to protect children are underinclusive because they do not similarly apply to murderers and sex offenders). Rather, what one hears, I think, is the following: Is it not ludicrous that morally good sexual minorities are denied a right that is otherwise freely given to all sorts of bad people?

45. In a sense, the progressive comparative argument might be characterized as a kind of reverse slippery slope. Whereas the slippery slope assumes that something not so bad or disgusting could (and likely would) lead us into something worse (and truly disgusting), the progressive comparative argument assumes that the worst or “most disgusting” has already happened (i.e., sex offenders marrying). For that reason, it makes no sense to prohibit that which is “less bad” or less disgusting, so to speak, from happening.

comparative argument could very well have the effect, whether intended or not, of triggering not only our moral outrage or indignation at the inequity of same-sex marriage prohibitions but also our disgust at the *less worthy* group that already enjoys that right. Indeed, when the city of San Francisco argued in its marriage equality brief that "the marriage exclusion tells lesbians and gay men that they are less worthy than child abusers, or sex offenders, or convicts in prison for murder. Because after all, those people *do* have the right to get married,"<sup>46</sup> we are likely outraged, and perhaps even disgusted, at two interrelated things: (1) the fact that worthy "lesbians and gay men" cannot get married (at least to each other); and (2) the fact that unworthy sex offenders, or "those people," can (assuming, of course, that "those people" are heterosexual).

In addition, even if the city of San Francisco's primary intention was not to direct our disgust at "those people" who "*do* have the right to get married," "those people" who "*do* have the right to get married" become the likely targets of our disgust simply by virtue of the way in which the city calls attention to those people and their right: (1) by calling them "those people"; and (2) by driving home the absurdity of the situation by italicizing "*do*." Similarly, by exhaustively cataloguing all the unsavory folks who *do* enjoy the right to marry—"[c]hild abusers, child molesters, even child murderers,"<sup>47</sup> or "murderers and rapists (even those who have murdered or raped previous spouses)"<sup>48</sup>—do not marriage progressives evoke disgust at the idea of the most unsavory among them enjoying something which worthy gays and lesbians cannot, in much the same way that we are disgusted at the prospect of same-sex marriage leading to incest? In other words, progressives' primary purpose for using the comparative argument might very well be to trigger our indignation over the inequity of same-sex marriage prohibitions. The fact that they use rhetoric that shares so much in common with the conservative comparative disgust argument, however, suggests that their comparative arguments might very well trigger our disgust as well.

---

46. Petitioner City and County of San Francisco's Opening Brief on the Merits, *supra* note 29, at 1-2.

47. Brayton, *supra* note 28.

48. Freeman, *supra* note 18, at 1-2.

The progressive comparative argument suffers from a number of descriptive and normative problems that Part III will address in greater detail. Before addressing the question of whether the progressive comparative argument is a good idea, however, it is first useful to inquire why marriage progressives have increasingly relied on an argument that imitates, whether deliberately or not, some of the most normatively questionable aspects of conservative marriage discourse. Part II will now turn to that inquiry.

## II. THE PROGRESSIVE COMPARATIVE ARGUMENT: WHY IS IT SO POPULAR?

Having demonstrated that the rhetorical discourse of marriage equality echoes the disgust-triggering features of the conservative comparative argument, or slippery slope, the following question remains: why might marriage progressives even unconsciously mimic the same rhetoric of disgust that is so often used against them? This Part offers three explanations for the appearance of this rhetoric in progressive marriage discourse. Section A considers a doctrinal explanation for this rhetorical phenomenon. Section B considers a rhetorical explanation. And Section C considers a disgust-based explanation.

### A. *The Legal/Doctrinal Explanation*

One explanation for the progressive appropriation of conservative marriage rhetoric is that it helps progressives show how “similarly situated” they are to the *good* heterosexuals who really deserve the right to marry. More specifically, marriage equality advocacy has increasingly deployed what Professor Marc Spindelman has referred to as a “like-straight” logic in order to show that same-sex couples are similarly situated to their heterosexual counterparts with respect to the right to marry.<sup>49</sup> For instance, Spindelman has observed that the predominant legal strategy of gay and lesbian plaintiffs in the litigation surrounding *Goodridge v. Department of Public Health*<sup>50</sup>

---

49. Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1365-75 (2005).

50. 798 N.E.2d 941 (Mass. 2003) (striking down Massachusetts's opposite-sex marriage limitation on state constitutional grounds).

was to emphasize their similarity to, rather than their differences from, heterosexual people who desire to marry.<sup>51</sup> He notes that the plaintiffs' lawyers united two "formally distinct doctrinal [i.e., liberty and equality] claims" with "a remarkably uncomplicated proposition: Lesbians and gay men are just like heterosexuals."<sup>52</sup> As he summarizes that strategy:

[L]esbian and gay rights advocates maintained that lesbians and gay men deserve the same rights and privileges heterosexuals receive, including the right to marry, and for just the same reasons. As Mary Bonauto, speaking for the lesbian and gay plaintiffs in the case, put it as she began her oral arguments before the Supreme Judicial Court:

The Plaintiffs stand before this court seeking nothing more and nothing less than the same respect under our laws and Constitution as all other people [read: heterosexuals] enjoy. The same "liberty right" to marry the person of their choice and the same "equal right" to marry on the same terms applied to other people.<sup>53</sup>

Spindelman further observes that the *Goodridge* majority's opinion, which found that Massachusetts's opposite-sex marriage limitation violated state constitutional liberty and equality guarantees, is driven by the same "like-straight" logic" that characterized the plaintiffs' arguments in that case.<sup>54</sup> The *Goodridge* majority, he remarks, "delivers . . . a definition of marriage that has built into it the idea that lesbians and gay men, hence their relations, are just like heterosexuals, and theirs."<sup>55</sup> Moreover, the majority "[e]xchang[es] the classic definition" of marriage, which rests on the "presumption that heterosexuality and homosexuality are unlike," for "one that implicitly negates it."<sup>56</sup> In short, the *Goodridge* majority opinion, like the successful litigation strategy that gave rise to it, is predicated on a simple truth, namely, the

---

51. Spindelman, *supra* note 49, at 1365-66.

52. *Id.* at 1365.

53. *Id.* at 1365-66 (quoting, in part, Unofficial Transcript of Oral Argument at 1, *Goodridge*, 798 N.E.2d 941 (Mass. 2003) (No. SJC - 08860)).

54. Spindelman, *supra* note 49, at 1365-66.

55. *Id.* at 1367.

56. *Id.*

fact “that homosexuality and heterosexuality are alike.”<sup>57</sup>

Because of its success as a litigation strategy in *Goodridge*, like-straight logic has come to dominate the legal strategies of advocates in more recent marriage equality litigation. For instance, the plaintiffs in one marriage equality case argued that “same-sex couples and their children deserve the same rights, protections, and dignity under the law as heterosexual couples and their children.”<sup>58</sup> Moreover, those same plaintiffs maintained that “just as heterosexual relationships arise from existing social and religious practices, so too do the relationships of . . . same-sex couples . . . who are responsible, contributing members of their communities.”<sup>59</sup>

Similarly, advocates for same-sex couple plaintiffs in other cases have argued that “[s]ame-sex committed relationships deserve to be honored with the same rights and responsibilities that are granted to heterosexual couples,”<sup>60</sup> and that “lesbian and gay couples often have stable, committed, and enduring relationships that play the same central role in their lives as they do for heterosexuals, and . . . they can provide stable family environments just as heterosexuals can.”<sup>61</sup> The like-straight logic that winds its way throughout recent marriage equality litigation hearkens back not only to the *Goodridge* majority’s implicit denial of the “presumption that heterosexuality and homosexuality are unlike,”<sup>62</sup> but also to the similar like-straight reasoning that animated the majority opinion in *Lawrence*.<sup>63</sup>

---

57. *Id.* at 1370.

58. Respondents’ Answer to Amici Curiae Briefs at 23, *Woo v. California*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006) (No. A110451).

59. *Id.* at 23 (citation omitted) (internal quotation marks omitted).

60. Brief of Amici Curiae Human Rights Campaign et al. in Support of Plaintiffs-Appellants at 6, *Lewis v. Harris*, 875 A.2d 259 (N.J. Super. Ct. App. Div. 2005) (No. A-002244-G3T5).

61. Appellants’ Abstract, Brief, and Addendum at 429-30, *Dep’t of Human Svcs. v. Howard*, 367 Ark. 55 (2006) (No. 05-814).

62. Spindelman, *supra* note 49, at 1367.

63. That is, *Lawrence* starts to talk about the sexual minority and the sexual majority in similar terms by establishing the latter as *the* point of comparison to the former. For instance, the Court states that “[p]ersons in a homosexual relationship may seek autonomy for . . . purposes [relating to marriage, procreation, contraception, family relationships, child rearing, and

Marriage progressives' like-straight reasoning is in many ways doctrinally compelled, or at the very least strategically savvy, because its purpose is to demonstrate the extent to which same-sex couples are like, rather than unlike, their heterosexual counterparts when it comes to marriage. Indeed, as all first-year law students know, laws that treat similarly-situated individuals differently violate constitutionally protected equality guarantees. Consequently, the more same-sex couples are like heterosexual couples, the more likely it is that a court will find, as did the majority in *Goodridge*, that same and opposite-sex couples are similarly situated with respect to the right to marry and that an evenhanded distribution of that right is constitutionally required.

The progressive comparative argument employs the same like-straight logic that has proven successful as a litigation strategy. As discussed, the progressive comparative argument highlights the extent to which sexual minorities, or same-sex couples, are better than, and therefore to some degree different from, contemptible characters like heterosexual murderers and sex offenders who already can get married. In so doing, the progressive comparative argument simultaneously implies that sexual minorities, or same-sex couples, are more like all those "good, law-abiding" heterosexuals who enjoy the right to marry and less like all those "bad, law-breaking" heterosexuals who also enjoy that right—but perhaps deserve it less. Put differently, most progressive comparative arguments implicitly create three categories of people: good heterosexuals (e.g., the non-sex offenders who can marry); bad heterosexuals (e.g., the sex offenders who can marry); and all sexual minorities. By implying that sexual minorities are better than the bad heterosexuals who may legally marry, the progressive comparative argument at least implicitly places sexual minorities/same-sex couples in the category of the good heterosexuals. In so doing, the progressive comparative argument employs a kind of like-

---

education], *just as* heterosexual persons do." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (emphasis added). Moreover, the *Lawrence* majority criticizes the *Bowers v. Hardwick* Court for framing the right at issue in that case as a "right to engage in certain sexual conduct" and thereby "demean[ing] the claim the individual put forward, *just as* it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse." *Id.* at 567 (emphasis added).

straight reasoning that is doctrinally motivated: it is not only that sexual minorities (or same-sex couples) are like heterosexuals, but that they are like the best heterosexuals who really deserve the right to marry.

In much the same way that like-straight reasoning as a litigation strategy emphasizes the extent to which same-sex couples are “just like” good, responsible heterosexual couples and “can provide stable family environments just as [good, responsible] heterosexuals can,”<sup>64</sup> the progressive comparative argument implicitly casts same-sex couples as the mirror image of good heterosexual couples (and sexual minorities as the mirror image of good heterosexuals). Indeed, the heterosexuals (or heterosexual couples) to whom marriage progressives analogize sexual minorities/same-sex couples are all remarkably good, responsible, upstanding heterosexuals (or heterosexual couples), heterosexuals “who are responsible, contributing members of their communities”<sup>65</sup> and who “can provide stable family environments.”<sup>66</sup> It is *these* heterosexuals with whom sexual minorities/same-sex couples are aligning themselves in marriage equality litigation, rather than with *those other* non-law-abiding heterosexuals whose enjoyment of the right to marry is perhaps undeserved, or at least less deserved—to say nothing of a slap in the face to all good sexual minorities.

The progressive comparative argument therefore works together with like-straight reasoning in order to show that sexual minorities are like not just heterosexuals, but the very best among them. When viewed in this light, laws that withhold the right to marry from same-sex couples and that treat them differently from the class to whom they are truly similarly situated, seem doubly wrong.

### B. *The Rhetorical Explanation*

A second explanation for the progressive appropriation of conservative marriage rhetoric is that it helps to persuade marriage traditionalists that marriage progressives are more, rather than less, like them. If the objective of rhetoric

---

64. Appellants' Abstract, Brief, and Addendum, *supra* note 61, at 429-30.

65. Respondents' Answer to Amici Curiae Briefs, *supra* note 58, at 23.

66. Appellants' Abstract, Brief, and Addendum, *supra* note 61, at 430.



generally is to persuade an audience,<sup>67</sup> then the objective of imitative rhetoric specifically is to persuade an audience by showing that audience that you are similar to it. Indeed, by adopting the language and figures of speech of their opponents, whether consciously or not, marriage progressives might not only convince their opponents that they are like them but also, in so doing, *get* their opponents *to* like them more.

Scholars of rhetoric, cognitive science, and social psychology have shown that language is at its most persuasive when the speaker is able to identify with her audience, and that rhetorical imitation is one of the most effective ways to set the conditions that make identification possible. For instance, literary theorist and philosopher, Kenneth Burke has argued that “[y]ou persuade a man only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, *identifying* your ways with his.”<sup>68</sup> In other words, in Burke’s view, the most effective way for a speaker to persuade his audience is to use “ideas and images that identify his cause with that” of his audience.<sup>69</sup> Burke refers to this form of persuasion as “identification,” a mode of communication that has a “magical” quality because it “induce[s] action in people” just as magic is thought “to induce motion in things.”<sup>70</sup> Reduced to its simplest terms, identification assumes the following: the more I “speak your language,” the more likely it is that you will identify with me, and, perhaps, do what I want. Under a more cynical view, rhetorical imitation is the way in which speakers trick, manipulate, or even deceive their audience into identifying with them and into doing what they want.<sup>71</sup> Under a less cynical view, rhetorical imitation

---

67. The *Oxford English Dictionary* defines rhetoric as “[t]he art of using language so as to persuade or influence others.” OXFORD ENGLISH DICTIONARY, *supra* note 5, at 857; see also KENNETH BURKE, A RHETORIC OF MOTIVES 46 (University of California Press 1969) (1950) (“Rhetoric is the art of persuasion, or a study of the means of persuasion available for any given situation.”).

68. BURKE, *supra* note 67, at 55.

69. *Id.* at 55.

70. *Id.* at 42.

71. See, e.g., *id.* at 23 (stating that “one need not scrutinize the concept of ‘identification’ very sharply to see, implied in it at every turn, its ironic counterpart: division. Rhetoric is concerned with the state of Babel after the Fall. Its contribution to a ‘sociology of knowledge’ must often carry us far into

is the way in which speakers use their magic to enable group cooperation, build social networks, and even “assist[ ] the survival of cultures by promoting social cohesion.”<sup>72</sup>

Cognitive scientists and social psychologists who have studied verbal and non-verbal mimicry in human interaction have shown that what for Burke is largely a rhetorical theory of identification is, in fact, a routine human practice. For instance, through a series of experiments, cognitive scientists have shown that individuals in a group “automatically” assume the verbal and non-verbal expressions of their group members at least in part to establish a positive relationship with them.<sup>73</sup> They have demonstrated that “the perception of another’s behavior (be it facial expression, body posture, mannerism, etc.) increases the tendency for the perceiver to behave in a similar manner, and that this is an entirely passive and nonconscious phenomenon.”<sup>74</sup> They refer to this “nonconscious mimicry” as a kind of “chameleon effect,” that is, “the mechanism behind mimicry and behavioral coordination” and “the source of the observed smoother social interaction and interpersonal bonding produced by the (nonconscious) mimicry.”<sup>75</sup> A series of experiments designed to test the “chameleon effect” theory confirmed scientists’ predictions that the “chameleon effect” is not only automatic and “nonconscious,” but also a useful way of “enhanc[ing] the positivity of social interactions” and promoting social cohesion.<sup>76</sup> That is, in group settings, verbal and non-verbal imitation can “produce greater rapport and smoother social interactions.”<sup>77</sup>

Similarly, a number of social psychologists and scholars of sociolinguistics have proposed that individuals mimic or

---

the lugubrious regions of malice and the lie”).

72. *Id.* at 43; see also *id.* (stating that rhetoric “is rooted in an essential function of language itself, a function that is wholly realistic, and is continually born anew; the use of language as a symbolic means of inducing cooperation in beings that by nature respond to symbols” (emphasis omitted)).

73. See Tanya L. Chartrand & John A. Bargh, *The Chameleon Effect: The Perception-Behavior Link and Social Interaction*, 76 J. PERSONALITY & SOC. PSYCHOL. 893 (1999).

74. *Id.* at 897.

75. *Id.*

76. *Id.* at 907.

77. *Id.*

imitate the verbal and non-verbal patterns of those with whom they wish to identify in both conscious and unconscious ways. According to the two theories on which these scholars have largely relied to describe this process, speech accommodation theory (SAT) and communication accommodation theory (CAT), individuals "adapt to each other's communicative behaviors in terms of a wide range of linguistic-prosodic-nonverbal features including speech rate, pausal phenomena and utterance length, phonological variants, smiling, gaze, and so on."<sup>78</sup>

CAT in particular "proposes that speech convergence reflects . . . a speakers' [sic] or a group's need (often unconscious) for social integration or identification with another."<sup>79</sup> Moreover, the theory relies "heavily on notions of similarity attraction, which, in its simplest form, suggests that as one person becomes more similar to another, this increases the likelihood that the second will like the first," and posits that "convergence through speech and nonverbal behaviors is one of the many strategies that may be adopted to become more similar to another, involving the reduction of linguistic dissimilarities."<sup>80</sup> In other words, according to CAT, individuals mimic or imitate the communicative patterns of others in order to (1) "become more similar" to them, (2) demonstrate that they are like them, and (3) increase the likelihood that others will like them.

Indeed, experiments designed to test the CAT theory found that "those who believed themselves to be similar coordinated and influenced one another's speech patterns and timing more than other dyads, presumably because perceived similarity induces a more positive orientation and a relatively high level of interpersonal certainty."<sup>81</sup> If the "chameleon effect" maintains that we unconsciously adapt to the verbal and non-verbal patterns of others, CAT confirms that such unconscious adaptation or imitation really works. In short, one way to get people to like us is to speak and act like them. Speaking and acting like them, in

---

78. CONTEXTS OF ACCOMMODATION: DEVELOPMENTS IN APPLIED SOCIOLINGUISTICS 7 (Howard Giles et al. eds., 1991).

79. *Id.* at 18.

80. *Id.*

81. *Id.*

turn, makes them like us more. These studies collectively suggest that what for Burke is largely a conscious or deliberate effort to imitate others, and thereby persuade them and foster social cohesion, is something which individuals already do anyway on a "nonconscious" level.<sup>82</sup>

Returning now to the progressive comparative argument, it could be that marriage progressives have increasingly deployed an argument that "sounds like" the conservative marriage slippery slope in order to identify with conservatives and to persuade them that they are more, rather than less, like them. If individuals naturally and intuitively appropriate the verbal and non-verbal gestures of others with whom they would like to identify and whom, perhaps, they are trying to persuade, then it could very well be that marriage progressives have started to sound more like marriage traditionalists for those very reasons. Just as from a doctrinal perspective it makes sense for marriage progressives to cast same-sex couples as being more like the good heterosexuals who really deserve to marry, so too from a rhetorical perspective does it make sense for them to cast their arguments in ways that will persuade marriage traditionalists that marriage progressives are more, rather than less, like them. In addition, by sounding more "like" marriage traditionalists, marriage progressives might not only convince their opponents that they are "like" them, but also, in fact, get those opponents to "like" them. Getting conservatives to like progressives, in turn, is something which could yield positive results from a strategic perspective, especially if it is the aim of progressives to persuade those who are on the fence, so to speak, about same-sex marriage to come to the other side.

That legal actors engage in rhetorical mimicry in order either to persuade opponents or to identify with those who are undecided on a certain issue is not, of course, an uncommon phenomenon. For instance, in the abortion context, Professor Reva Siegel has recently suggested that "the antiabortion movement has borrowed core elements of the pro-choice claim, and produced a woman-protective

---

82. At certain points in *A Rhetoric of Motives*, however, Burke also suggests that rhetorical identification sometimes operates on an unconscious level. BURKE, *supra* note 67, at 35 (stating that "there is a wide range of ways whereby the rhetorical motive, through the resources of identification, can operate without conscious direction by any particular agent").

antiabortion argument that mixes new ideas about women's rights with some very old ideas about women's roles."<sup>83</sup> Moreover, Siegel has shown that the conservative appropriation of progressive rhetoric has been an extremely effective way to "reach" and "appeal to . . . swing voters," that is, those who are "concerned about protecting women as well as the unborn."<sup>84</sup> As in the abortion context, so too in the marriage context have marriage progressives "borrowed," whether deliberately or not, key elements of a rhetorical strategy that has been a long time favorite of legal actors generally and marriage traditionalists specifically. While such borrowing might appear counter-intuitive to us at first blush—indeed, why would a group that is commonly the unfortunate target of rhetoric X by group Y appropriate features of rhetoric X to persuade group Y?—scholars have shown that it is not only intuitive but an extremely effective agent of persuasion as well.

### C. *The "Conservation of Disgust" Explanation*

A third and final explanation for the progressive appropriation of disgust-driven conservative marriage rhetoric is that disgust is a universal feature of all societies, which "make use of disgust to inform their judgments of high and low, worthy and unworthy."<sup>85</sup> More specifically, according to some commentators, those who are "low" in status inevitably make use of the same disgust-driven rhetoric that is so often used against them by those who are "high" in status. For instance, those who support the military's exclusionary policy, popularly known as "don't ask, don't tell," have suggested that they "are disgusted by the idea of sharing barracks with gays" and that their disgust for sexual minorities (or the conduct in which that class presumptively engages) is one of the driving purposes behind the exclusionary policy.<sup>86</sup> At the same time, however, those who oppose a gay-soldier ban, and who advocate for equal rights for sexual minorities in the

---

83. Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 992-93.

84. *Id.* at 992.

85. Dan M. Kahan, *The Progressive Appropriation of Disgust*, in *THE PASSIONS OF LAW* 63, 64 (Susan A. Bandes ed., 1999).

86. *Id.* at 65.

military, have similarly suggested that they find the homophobia that underlies the exclusionary policy itself to be a source of disgust.<sup>87</sup>

Professor Dan Kahan refers to this phenomenon whereby those who are low in status (or whereby those who advocate for those who are low in status) appropriate the same idiom of disgust that is so often used against them as “the conservation thesis.”<sup>88</sup> Drawing from Professor William Miller’s work on disgust, Kahan contends that “[t]he conservation of disgust across distinct and evolving modes of social organization explains why groups that are low in status seek to appropriate rather than annihilate the idiom of disgust, and why disgust, rather than disappearing, becomes a salient focal point for political contention within socially fluid, pluralistic societies.”<sup>89</sup> Quoting Miller in part, Kahan notes that “[i]n the hurly-burly of anxious competition for status,’ different groups aggressively market their favored conceptions of disgust ‘either to maintain rank already achieved, to test whether it ha[s] been achieved, or to challenge for its acquisition.”<sup>90</sup> In other words, in the struggle for equality, groups that are low in status will predictably appropriate the same idiom of disgust that was at one time the prerogative of those who despise them. In so doing, they establish what Kahan calls a liberal “counterregime of disgust” that counteracts conservative disgust.<sup>91</sup> Under this view, “disgust inevitably perseveres as social norms change.”<sup>92</sup> To return to the above-mentioned example, the homophobic disgust that inspired “don’t ask, don’t tell” will “inevitably” become disgust for the homophobe who supports that policy.

Miller and Kahan’s “conservation thesis” is a useful heuristic for explaining the progressive appropriation of conservative disgust-laden rhetoric in the struggle for marriage equality. Whereas Miller and Kahan contend that those who are low in status “inevitably” redirect the disgust of the high against the high (e.g., the sexual minority who

---

87. *See id.*

88. *Id.* at 64 (emphasis omitted).

89. *Id.* at 65.

90. *Id.* (quoting WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 217 (1997)).

91. *Id.* at 71.

92. *Id.* at 65.

finds the homophobe's homophobia repugnant) here a liberal discourse of disgust is being redirected toward those who are thought to be *truly* disgusting in an effort to secure equal rights. Rather than establishing a "counterregime of disgust," the liberal or progressive comparative argument that posits that gays and lesbians should be able to marry because sex offenders already can effectively establish a mini-regime of disgust within a larger discourse of disgust. While progressives are not deploying this mini-regime of disgust against those who are high in status in an effort to counteract their disgust, they are deploying the rich "expressive capital"<sup>93</sup> of disgust in an effort to advance a liberal objective—something which Kahan posits is an "inevitable" by-product of liberal social movements that are "concerned with securing . . . 'equal rights.'"<sup>94</sup> In so doing, liberals who advocate for same-sex marriage deploy the idiom of disgust as a "progressive rather than a reactionary force";<sup>95</sup> in the process, new hierarchies are created and "disgust inevitably perseveres as social norms change."<sup>96</sup> Indeed, were a court to find that an opposite-sex marriage limitation was unconstitutional on the disgust-driven basis that "even sex offenders may marry," then certainly disgust "perseveres" notwithstanding the fact that it functions as an agent of, rather than against, social and legal change.

### III. THE PROGRESSIVE COMPARATIVE ARGUMENT: IS IT A GOOD IDEA?

So far, this Essay has demonstrated that the progressive comparative argument on which same-sex marriage advocates have increasingly relied in marriage equality litigation mimics, whether deliberately or not, the conservative slippery slope trope. In addition, it has provided three different explanations for this peculiar form of rhetorical mimicry and has attempted to explain why liberals would appropriate a discourse that is so frequently deployed to advance conservative, if not reactionary, objectives. Now, this Essay turns to a more normative evaluation of the

---

93. *Id.* at 71.

94. *Id.* at 65 (quoting MILLER, *supra* note 90, at 235).

95. *Id.* at 73.

96. *Id.* at 65.

progressive comparative argument. Specifically, it will offer three reasons why progressives should remain wary of comparative discourse that mimics the slippery slope and its disgust-inducing, or disgust-provoking, rhetoric in marriage equality litigation: (1) because the progressive comparative argument advances an image of marriage that undercuts the dominant conception of marriage that emerges from marriage equality discourse; (2) because the progressive comparative argument could have the unfortunate effect of collapsing gays and lesbians (or same-sex couples) into the unsavory individuals who purportedly sit beneath them; and (3) because the progressive comparative argument advances a vision of tolerance that is decidedly thin.

A. *The Progressive Comparative Argument Undercuts Marriage Equality's Dominant Conception of Marriage*

The progressive comparative argument is strategically counterproductive because it advances an image of marriage that is inconsistent with the dominant conception of marriage that emerges from marriage equality discourse. More specifically, advocates for marriage equality have largely argued that marriage is a wholesome and salutary institution that effectively changes or transforms the way that others perceive you. For instance, briefs that have been filed in recent marriage equality litigation overwhelmingly suggest that marriage (1) is a self-defining term that lends "cultural respect and recognition" to those who marry;<sup>97</sup> (2) "gives [one] automatic membership in a vast club of people whose values are clarified by their choice of marriage";<sup>98</sup> (3) can help to combat the deep-seated stereotypes and "prejudices of others";<sup>99</sup> and (4) not only makes relationships "more real"<sup>100</sup> but also the individuals who enter into that relationship "equal in other people's

---

97. Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 59, *Kerrigan v. Connecticut*, No. 04-4001813 (Conn. Super. Ct. July 12, 2006).

98. *Lewis v. Harris*, 908 A.2d 196, 226 (N.J. 2006) (Poritz, J., concurring in part and dissenting in part).

99. Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, *supra* note 97, at 59 n.65.

100. See *Lewis*, 908 A.2d at 225-27.



eyes.”<sup>101</sup> Indeed, recent marriage equality arguments conceptualize marriage as a value-conferring institution, one whose magical, poetic, and nearly alchemical powers not only alter the way that others perceive you but also effectively change who you are as a person.<sup>102</sup>

If marriage equality advocates truly believe that marriage has such transformative potential, then presumably the unsavory folks—heterosexual sex offenders and murderers—who already can get married become less so upon entering a marital relationship. If marriage is important because it lends “cultural respect and recognition” to those who get married, because it helps to undermine the “prejudices of others,” and because it makes the people who enter into that relationship more valuable and even more real in the eyes of others, then at least theoretically the rapist and the murderer who gets married becomes more respectable—and less contemptible—merely by virtue of the fact that he is, quite simply, married. Under this logic, the pedophile who chooses to marry becomes a better and less loathsome person than the pedophile who chooses not to. Under this logic, the “prejudices” to which the sex offender is daily subjected should, at least theoretically, vanish once he gets married. Or, if the sex offender is already married at the time that the sex offense occurs, then we should believe that marriage has the transformative potential to render him a more worthy and valuable individual in the eyes of others.

The progressive comparative argument undermines this wholesome vision of marriage because it suggests that the despicable cast of characters who are afforded the right to marry somehow remain despicable notwithstanding the

---

101. *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 761 n.23 (Cal. App. Dep’t Super. Ct., 2006) (Kline, J., concurring in part and dissenting in part), *review granted and opinion superseded*, 149 P.3d 737 (Cal. 2006).

102. For the conceptualization of marriage as poetry, see Ronald Dworkin, *Three Questions for America*, 53 N.Y. REV. BOOKS, Sept. 21, 2006, at 30 (stating that “[t]he institution of marriage is unique: it is a distinct mode of association and commitment with long traditions of historical, social, and personal meaning” and that civil unions are insufficient because “[w]e can no more now create an alternate mode of commitment carrying a parallel intensity of meaning than we can now create a substitute for poetry or for love”); *see also* *Lewis v. Harris*, 875 A.2d 259, 290 (N.J. Super. Ct. App. Div. 2005) (Collester, J.A.D., dissenting) (stating that “the essence of marriage . . . is probably best left to poets rather than judges” to express).

fact that they might enter into a relationship that confers worth, value, and equality. As Part I argued, the progressive comparative argument relies on a hierarchy of worth that assumes that gays and lesbians (or same-sex couples) are better than all the bad heterosexuals who either are already married or at the very least given the opportunity to choose whether or not to get married. Under the progressive comparative view, then, marriage exists on a hierarchy, with some marriages being more worthy than others and with not all marriages being equal. This progressive comparative notion that not all marriages *are* equal, however, undercuts the dominant conception of marriage that emerges from marriage equality discourse, that is, an institution that confers not only worth but also, and perhaps more important, equality as well. In other words, where the progressive comparative argument understands marriage (and the individuals who enter into it) as existing on a static hierarchy, marriage equality discourse more generally sees marriage as an equalizing force. Where the progressive comparative argument does not necessarily understand marriage as something that changes you—indeed, the image of a static hierarchy that the progressive comparative argument projects suggests quite the contrary—marriage equality discourse more generally sees marriage as having transformative power.

B. *The Progressive Comparative Argument Could Have the Unfortunate Effect of Collapsing Sexual Minorities Into the Deviant Class of Heterosexuals From Whom They Claim to be Different*

The progressive comparative argument could have the unfortunate and counterproductive effect of encouraging others to group sexual minorities (or same-sex couples) with the very class of individuals from whom they are trying to distance themselves. As this Essay suggested in Part I, the progressive comparative argument establishes a hierarchy of relative worth and positions sexual minorities (or same-sex couples) on that hierarchy above the heterosexual riff-raff that already enjoys the right to marry. In so doing, the argument attempts to create distance between those who are superior (and who therefore deserve marriage more) and those who sit beneath them (and who therefore deserve marriage less). In even considering sexual minorities

*relative* to an allegedly inferior class of deviant individuals, however, the progressive comparative argument sets the conditions for establishing a *relationship* between those two groups. The very fact that the progressive comparative argument is a *relative* one suggests that group X is always being considered *relative* to group Y. Indeed, any relative or comparative argument that functions according to a logic of "better than" opens up the possibility that an audience will start to consider that argument's relative points or variables of comparison in similar or comparable ways.

Here, it is useful to return to the structure of the slippery slope, the rhetorical figure with which the progressive comparative argument shares many characteristics. Above, this Essay suggested that the genius of the slippery slope is that it forces us to consider the similarities between the things that appear on it—same-sex marriage, incest, bestiality—even as its very structure posits that some things on the slope (incest) are worse than others (same-sex marriage). In other words, while the slope assumes that same-sex marriage is not as dangerous or deviant as incest, its slippery gradient suggests that the less bad thing will ineluctably collapse into something worse. While we might be able to enumerate any number of ways by which to distinguish between same-sex marriage (the less bad thing) and incest (the worse thing), the structure of the slippery slope effectively forces us to consider those *relative* variables on it in similar or analogous terms. At a certain level, then, it is not so much that same-sex marriage will lead us into incest, but rather that same-sex marriage is *like* or *similar* to incest.

Because the progressive comparative argument envisions a fixed or static hierarchy of persons rather than a slippery slope of relationships, the likelihood that an audience would collapse the relative variables that appear on that hierarchy into each other is not as great. That said, and much like the slippery slope, the progressive comparative argument forces us to consider the less bad thing (sexual minorities/same-sex couples) relative to the worse thing (sexual offenders and murderers). While we might be able to enumerate any number of ways by which to distinguish between sexual minorities and sexual offenders, in the process of doing so we might begin to consider the ways in which they are similar to or like each other. Comparing sexual minorities to sexual offenders—

even if the comparison highlights how much better the former is than the latter—is especially unwise given that before *Lawrence v. Texas* members of the former group presumptively engaged in conduct, sodomy, which was criminal in some jurisdictions and could subject those individuals to sex offender status.<sup>103</sup> Comparing sexual minorities to pedophiles in particular—again, even if the comparison is intended to highlight that the former is comparatively better than the latter—could trigger stereotypical fears that all sexual minorities are pedophiles (and vice versa), much in the same way that comparing same-sex marriage and incest could have the effect of collapsing the two into each other and triggering disgust over both. Indeed, even after *Lawrence*, courts have held that evidence of a defendant's homosexuality, unless relevant to the crime for which he is charged, cannot be introduced at trial because “[a] jury’s inference that a defendant is gay can cause it also to infer that he deviated from traditional sexual norms in other ways, specifically that he engaged in illegal sexual conduct with minors.”<sup>104</sup> By juxtaposing sexual minorities and sexual deviants, the progressive comparative argument might work in a similar manner by raising the “inference” that the two groups share a common set of characteristics—to be sure, why else would they even be situated on the same hierarchy?—and are therefore comparable at least in some sense.

---

103. Before *Lawrence*, the Supreme Court held in *Bowers* that statutes that criminalized even consensual sodomy did not violate the United States Constitution. 478 U.S. 186, 189 (1986). In addition, the *Lawrence* majority noted that the petitioners’ criminal sodomy convictions in that case required them to register as sex offenders according to the “registration laws of a least four States were [they] to be subject to their jurisdiction.” 539 U.S. 558, 575 (2003).

104. *Commonwealth v. Baran*, Nos. 1804251, 181001 2006 WL 2560317, at \*26 (Mass. Super. Ct. June 16, 2006); see also *Guam v. Shymanovitz*, 157 F.3d 1154, 1161 (9th Cir. 1998) (stating that “in our society homosexuality . . . is often equated with indecency, perversion, and immorality, and gay persons are often greeted with distrust and suspicion, particularly in their interactions with children”); *High Tech Gays v. Def. Indust. Sec. Clearance Office*, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987) (“Wholly unfounded, degrading stereotypes about lesbians and gay men abound in American society. Examples of such stereotypes include that gay people desire and attempt to molest young children . . .”), *rev’d in part and vacated in part*, 895 F.2d 563 (9th Cir. 1990).

C. *The Progressive Comparative Argument Advances a Thin Vision of Tolerance and Inclusion*

The progressive comparative argument is normatively undesirable because it advances a decidedly thin vision of tolerance, one which does not necessarily promote a robust norm of inclusion in our liberal democratic state. To say that sexual minorities deserve the right to marry because all the bad heterosexuals already have that right is surely not the most effective way to achieve inclusion—to say nothing of true equality. If anything, the claim that sexual minorities should be able to marry because even sex offenders can, signals to others that sexual minorities should be tolerated not because same-sex marriage contributes to society in any positive or salutary way but rather because we already tolerate those who likely disgust us even more.

The thin vision of tolerance that the progressive comparative argument projects invites us to consider more generally what tolerance has come to mean in a liberal democracy such as ours. In her illuminating study of tolerance in contemporary American politics and social movements, *Regulating Aversion: Tolerance in the Age of Identity and Empire*, Professor Wendy Brown has revealed the dark underside of tolerance discourse and tolerance politics in a number of different political and social contexts, from the War on Terror to the struggle for gay rights.<sup>105</sup> Brown observes, for instance, that

tolerance involves neither neutrality toward nor respect for that which is being tolerated. Rather, tolerance checks an attitude or condition of disapproval, disdain, or revulsion with a particular kind of overcoming—one that is enabled either by the fortitude to throw off the danger or by the capaciousness to incorporate it or license its existence.<sup>106</sup>

Far from a wholesale rejection of the very notion of disgust as an emotion that is somehow incompatible with liberal democratic norms, tolerance represents an accommodation of that which disgusts or repulses us. As Brown nicely puts

---

105. WENDY BROWN, *REGULATING AVERSION: TOLERANCE IN THE AGE OF IDENTITY AND EMPIRE* (2006).

106. *Id.* at 26.

it, tolerance “provides a gracious way of allowing one’s tastes to be violated.”<sup>107</sup> In other words, tolerance and revulsion go hand in hand in our liberal democratic order. Liberal tolerance discourse encourages us to tolerate, rather than to reject, that which disgusts us. In turn, that same liberal discourse of tolerance, which signals that we are merely “tolerating” or enduring a foreign element, reinforces the idea that “something contaminating or dangerous is at hand, or something foreign is in issue.”<sup>108</sup> She writes: “[t]olerated individuals will always be those who deviate from the norm, never those who uphold it, but they will also be further articulated as (deviant) individuals through the very discourse of tolerance.”<sup>109</sup>

In Part II, this Essay suggested that one explanation for the progressive comparative argument is that it is doctrinally motivated. Specifically, the progressive comparative argument represents a way for marriage progressives to show that same-sex couples are unlike the bad heterosexuals who already have the right to marry and more like—or, in doctrinal terms, more similarly-situated to—the very best heterosexuals who *really* deserve that right. Under this view, marriage progressives are not necessarily asking society to *tolerate* sexual minorities/same-sex couples. Rather, they are asking society to give sexual minorities/same-sex couples, as good, upstanding citizens, what they really deserve and what is constitutionally required, namely, an evenhanded distribution of the marital right. Moreover, and as Part II also suggested, it could be that marriage progressives are using an idiom of disgust to make that doctrinal argument either because: (1) they are appropriating, whether deliberately or not, the rhetorical gestures of marriage conservatives in order better to persuade them (the rhetorical explanation); or (2) the idiom of disgust is a universal and persistent feature of all social and political movements, something to which even progressives will “inevitably” be drawn in the struggle for equality (the “conservation of disgust” explanation).<sup>110</sup>

---

107. *Id.* at 25.

108. *Id.* at 27.

109. *Id.* at 44.

110. See Kahan, *supra* note 85, at 64 (“Although the objects of disgust vary across places and times, *all* societies inevitably make use of disgust to inform their judgments of high and low, worthy and unworthy.”).

While the progressive comparative argument might be explained as an attempt on the part of marriage progressives to persuade marriage conservatives that same-sex couples are unlike the bad people who already can get married, its ultimate effect, I think, is to issue a plea for toleration: tolerate us because you already tolerate something—or someone—far worse, and far more repulsive, than us. When viewed in this light, the progressive comparative argument nicely encapsulates Brown's tolerance thesis, that is, the claim that liberal tolerance discourse not only contains disgust but also reinforces it. Indeed, to say that sexual minorities deserve equal marital rights because a whole host of contemptible figures already do is not to say that sexual minorities deserve equal rights because they do not repulse us. Rather, it is to say that sexual minorities deserve equal rights in spite of the fact that they might, or do, repulse us.

### CONCLUSION

The primary objective of this Essay has been to consider the reasons for, and the wisdom of, a discrete rhetorical phenomenon, namely, the rise of the progressive comparative argument in the legal discourse surrounding marriage equality. While perhaps narrow in scope, this Essay has much broader legal implications and applications. From a theoretical standpoint, it has confirmed Miller and Kahan's theses that an idiom of disgust is not the exclusive handmaiden of conservatives and reactionaries, as well as Brown's thesis that revulsion sits at the heart of liberal tolerance discourse. Moreover, it has provided an alternative context in which to situate and understand the concept of rhetorical mimicry, something which is often viewed in negative terms vis-à-vis the push for marriage equality. From a strategic litigation perspective, this Essay offers a moment for marriage progressives to revisit the rhetorical strategies that they have deployed in the struggle for equal rights and to question whether those strategies best promote the goal of inclusion that same-sex couples undoubtedly deserve.